

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

ELPLAST AMERICA, INC.¹

Employer

and

**DISTRICT LODGE 6, INTERNATIONAL
ASSOCIATION OF MACHINISTS &
AEROSPACE WORKERS, AFL-CIO**

Petitioner

Case 18-RC-259917

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of production and maintenance employees employed by the Employer, including quality control employees, warehouse employees, operators, clean room operators, maintenance employees, and production supervisors. The unit sought by the Petitioner includes four production supervisors (PSs).

The Employer contends that the PSs are statutory supervisors within the meaning of Section 2(11) of the Act given their authority to assign and responsibly direct the work of employees using independent judgment and effectively recommend hiring and discipline. Petitioner denies that the PSs possess these indicia of supervisory authority. Based on the record and relevant Board cases, I conclude that the Employer has met its burden to show that the PSs possess the authority to effectively recommend hiring and discipline. As the PSs are statutory supervisors, they must be excluded from the unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Based on the record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it would effectuate the purposes of the Act to assert jurisdiction herein.²
3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

¹ The Employer's name appears as amended by stipulation of the parties.

² The parties stipulated that the Employer, an Iowa corporation with an office and place of business located in Marion, Iowa, is engaged in the manufacture of plastic zippers. During the 12-month period ending May 20, 2020, a representative period, the Employer in the course and conduct of its business operations sold and shipped goods valued in excess of \$50,000 directly to points located outside the State of Iowa.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. There is no collective-bargaining agreement in effect covering any of the individuals in the petitioned-for unit and, therefore, no contract exists barring consideration of the instant petition.
6. The parties have stipulated that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees including quality control employees, warehouse employees, operators, clean room operators, and maintenance employees; excluding office clericals, professional employees, managers, guards and supervisors as defined in the Act, and all other employees.

FACTS

A. The Employer's Operations

In approximately 2005, the Employer's parent company, Elplast Europe, commenced operations to manufacture plastic zippers. Thereafter, in 2016, the Employer commenced US operations at its Marion, Iowa facility. The Marion manufacturing facility is the Employer's only US facility and the only facility involved in this proceeding. The nature of the Employer's business is such that it has its own trade secret protected manufacturing process. In this regard, the Employer has designed and manufactured approximately 25 different and unique plastic zippers ranging in width from one-tenth to 40 millimeters.

Approximately 38 employees work for the Employer. Chad Rupert is the President of the Employer. Manufacturing/Research & Development Manager Jakub Wronka manages the facility under the direction of Rupert. Plant Manager Michael Burton³ and Production Manager Brian Dergo report directly to Wronka. Dergo also reports to Burton in Wronka's absence. All of the petitioned-for employees report to Dergo; this includes four PSs; eight machine operators; two quality control employees; one clean room operator; one maintenance employee; and one warehouse employee.

The record also describes an unnamed Quality Control (QC) Manager and an unnamed Logistics Manager; it is unclear who they report to or who reports to them. The record references by name former QC Manager Brian Conway and former Logistics Manager Chris Simonson; it is unclear whether the QC and Logistics Manager positions are currently filled.

³ Burton also acts as the Employer's Human Resources (HR) representative as there is no formal HR department at the facility.

The record also briefly mentions one to two engineers, including a process engineer who works with Production Manager Dergo in determining product output. Finally, the record briefly references the Employer's front office operations which include administrative, finance, supply chain, and sales.

The production work performed at the facility includes pushing plastic through a machine into a die that forms the shape of the zipper. Once the production manufacturing process is complete, the product is boxed, warehoused and delivered to the Employer's customers.

Currently, the Employer operates three production shifts, Monday through Friday, at its single-building facility with six production lines and seven operational machines⁴ per shift. Shift hours are 6:00 a.m. to 2:00 p.m. (first shift); 2:00 p.m. to 10:00 p.m. (second shift); and 10:00 p.m. to 6:00 a.m. (third shift). Three operators, one quality control employee, and one PS are assigned to the production floor each shift. These employees are collectively referred to herein as production line employees.

The record evidence describes that the Employer currently has a non-operational fourth production line and room to expand to add two additional lines and another building on its Marion premises. In this regard, the Employer's goal is to soon hire additional production and maintenance employees to operate a fourth shift and triple the amount of its business in the next five years.

B. The PSs

1. Overview, Duties other than Hiring and Discipline, and Secondary Indicia

The parties stipulated that all PSs perform the same job duties and possess the same responsibilities and the tasks and responsibilities of PSs do not differ from one PS to another.

In about Fall 2019, the Employer created the PS position, eliminated the position of team lead, and started hiring the four petitioned-for PSs. At this time, Plant Manager Burton⁵ created a job description for the PS position, however, it does not appear that this job description was disseminated to any of the PSs.⁶ First shift PS Devin Kelly and third shift PS Devon McMillan were both newly hired about September 16, 2019. During this same time period, second shift PS Jeff Taylor, a former team lead at the facility, was promoted to second shift PS. Burton along with Manufacturing Manager Wronka were in charge of hiring and promoting these three PSs. Thereafter, in about late December 2019 to January 2020, Production Manager Dergo (hired November 4, 2019) and Burton became responsible for hiring PSs. In January 2020, they hired Paul York as a fourth shift PS in line with the Employer's stated goal of expanding operations.

⁴ An eighth machine is not currently operational.

⁵ Burton was initially hired by the Employer as a consultant in September 2019 and became Plant Manager effective April 20, 2020.

⁶ There is record evidence of another PS job description dated November 2016 which was provided to first shift PS Devin Kelley at some time after he was hired. The record does not show that any of the other PSs received this job description at any time, and I do not make any findings with regard to this job description.

As the Employer continues to assess the addition of a fourth shift, PS York has been in training with the other PSs and is working among the three existing shifts.

The PSs spend a majority of their time on the production floor with the other production line employees. As stated, one PS, three operators and one quality control employee are assigned to the production floor per shift. All production is generated via a master production plan which is developed weekly by the logistics and supply chain team led by the Logistics Manager. The logistics team reviews product orders in connection with inventory levels to determine what products can be produced on the production floor week to week. Production Manager Dergo, assisted by the process engineer, is responsible for deciding which lines and machines will be run in production to accomplish weekly production goals. Dergo relies heavily on the technical expertise of the PSs regarding machine set-up and troubleshooting as well as assembling and changing the machine dies and materials. The operators are not similarly skilled or qualified to provide such advice or perform such tasks.

When the PSs arrive to work, they change into a production uniform consisting of scrub pants, long sleeve t-shirt, hair/beard net, ear plugs and steel-toe shoes. Due to the sterile nature of the facility, they must undergo a sanitization process consisting of an air shower before going on the production floor. At the beginning of the shift, the PSs touch base with the previous shift PS. On the floor, the PSs assign operators to specific lines and machines based on production needs and goals. The PSs note on a “leader board” which operator is running which line(s) and machine(s) each shift. The machines on each line are identical, while product among the lines varies such that each line is producing a different size zipper. As noted, product is assigned to the line via the production plan. The PSs are also responsible for designating shift breaks for production line employees. The record demonstrates that the PSs infrequently perform operator machine work as needed.⁷

As part of their job responsibilities, the PSs’ complete pre-determined metrics and quality control forms and production/operational checklists on each shift to ensure that production standards as set forth in the weekly production plan are being met. These forms and checklists largely address quality control issues related to machine set-up; ensuring material quantities are adequate and filled to capacity;⁸ performing line changeovers; and inspecting the overall quality of the production lines and production line employees. Concerns regarding quality control issues are raised in some circumstances by the PSs to the attention of production management or specific quality control employees who are able to advise regarding machine and/or equipment adjustments; or quality control issues are initiated in other circumstances by production management or quality control staff to the attention of the PSs with instructions for machine and/or equipment adjustments or other instructions to resolve quality issues. The record contains specific examples of metrics forms and quality checklists the PSs’ are required to complete. One production line form shows production categories checked off by the PSs such as water quality, quantities and temperature; oil spills; equipment conditions; and line cleanliness. On another production line form, the PSs verify they have conducted operational inspections of production

⁷ Recently, PS Jeff Taylor performed operator work for one week due to COVID-19 operational issues.

⁸ The record references the Employer’s “Novatec materials system” which is presumably a computer system that maintains an inventory of available materials.

machines and tools and have rated production line employees, including themselves, in pre-determined areas such as cleanliness, tool storage, and documentation. On an operational checklist called a “self control sheet,” the PSs verify and check off quality control issues such as scale/dimensions of products, and quality of equipment and zippers. Additionally, on this sheet the PSs verify time spent by production line employees in performing production tasks. Finally, on an equipment checklist for an air compressor, the PSs verify they have checked the quality of the air compressor in pre-determined categories. The PSs also complete a shift report at the end of each shift.

All management staff are present at the facility during day shift hours from about 8:00 a.m. to 6:00 p.m. After-hours, one to two PSs are the highest-ranking officials on the premises. However, Production Manager Dergo is on-call and available by mobile phone at most times. The PSs are primarily responsible for ensuring safety on the production floor during their shift and in the entire facility when no management representatives are present. This includes stopping a production line at any time based on safety concerns. The PSs do not possess any responsibilities with regard to scheduling of any employees’ regular or overtime hours, staffing/call-offs, or vacation requests. Such matters are handled by Production Manager Dergo, who may consult with the PSs in such matters related to general coverage and production issues. The PSs are authorized on their own to send employees home who are ill, intoxicated, or acting violent or threatening. In all situations, the PSs are required to advise Dergo of any employee sent home. The PSs are not involved in any payroll matters, evaluations, or pay adjustments for other employees. Currently, there is no regular evaluation procedure for the PSs.⁹

The PSs are paid an hourly wage rate of \$24.15 and enjoy the same benefits as all facility employees. The PSs and operators wear the same uniforms which are not worn by any management personnel. The PSs and operators share designated parking at the back/side of the facility parking lot while all management staff has designated parking in the front of the facility. The PSs, as well as seasoned operators, are involved in on-the-job training for new and less experienced operators. Manufacturing Manager Wronka trains all production employees on new products and equipment. Production Manager Dergo leads weekly production meetings attended by first and second shift production line employees and the QC Manager. Dergo prepares a bullet-point agenda from a computer template for the third shift PS who holds the weekly production meetings for third shift production employees. The PSs do not attend any management meetings.

2. Hiring

Before the team lead position was eliminated and the PS position was created and commenced in Fall 2019, the Employer’s Statistics Manager was exclusively in charge of hiring all hourly employees. Since then, the Employer designated Production Manager Dergo to be in charge of hiring of production employees. The record demonstrates that with the creation of the PS position, the Employer has also intended for the PSs to be involved in the hiring of operators

⁹ Recently, Production Manager Dergo provided the PSs with a self-evaluation to self-rate themselves regarding general strengths and weaknesses.

along with Dergo. In this regard, the record contains one example of a PS's involvement in the hiring of an operator in about April 2020. In this example, Dergo conducted an initial brief screening interview of the candidate applying for a second shift operator position. Following the screening interview, Dergo immediately consulted with second shift PS Jeff Taylor to see when Taylor would be available to conduct a comprehensive interview with Dergo of the candidate. Dergo testified that he "did not want to push forward with hiring somebody until [Taylor] gave me his agreeance (*sic*) that he wanted to do that or not." Following the interview, Dergo and PS Taylor jointly agreed that the candidate was suitable for hire and an offer of employment was thereafter made. The record establishes that this operator has been the only production line employee hired since the PS position was created and commenced and that the Employer intends for the PSs to be regularly involved in all production line employee interviews and hiring going forward. In this regard, Plant Manager Burton testified that the Employer requires PSs to "buy off on" all new hire operator applicants.

3. *Discipline*

The PS job description notes that the PSs are responsible for "regularly [acknowledging] and administering disciplinary practices as needed." Before the team lead position was eliminated and the PS position was created and commenced in Fall 2019, Manufacturing Manager Wronka along with the former Production Manager were exclusively in charge of all employee discipline. Since then, the record demonstrates that Production Manager Dergo and the PSs are involved in the discipline of production line employees. The PSs do not possess authority to independently discipline, suspend or discharge any employees. Rather, Dergo has generally instructed the PSs to handle and resolve issues related to employee attendance, misconduct and behavioral issues via verbal discussion with the offending production employee short of involving any formal discipline. Such verbal discussions are not recorded in writing by the PSs and are not considered by the Employer to be formal discipline. The record contains one example of a PS recommending formal discipline beyond a verbal discussion on about April 21, 2020. In this example, third shift PS Devon McMillan reported to Dergo via email that he witnessed a machine operator punching a trash bucket and later slamming down the tension arm of a machine. McMillan further reported that he had previous verbal discussions with the same operator regarding anger issues. McMillan expressed to Dergo that he was uncomfortable with the operator's behavior, that he felt Dergo needed to intervene in the matter, and that formal discipline was warranted. Dergo and McMillan discussed the matter further and jointly determined that specifically a written warning to the operator was warranted. Thereafter, Dergo drafted the write-up based on PS McMillan's report. The stated basis of the write-up was breach of company policy (threats and workplace violence).¹⁰ Before the write-up issued, Dergo asked McMillan to review it and make any changes or additions that he thought were necessary. Dergo and PS McMillan then met with the operator to issue the written warning discipline. Dergo led the disciplinary meeting and provided PS McMillan an opportunity to address the operator. Both Dergo and PS McMillan signed the discipline in the "supervisor" area of the write-up. The record establishes that this operator is the only production line employee disciplined since the PS

¹⁰ No Employer personnel policies, including a separate disciplinary policy or work rules were introduced into evidence.

position was created and commenced and that the Employer intends for the PSs to be regularly involved in all disciplinary matters involving production line employees going forward.

C. The Operators

The operators spend their time on the production floor fulfilling product orders. When they arrive at work, they change into the same production uniform as worn by the PSs and they undergo the same sanitization process before deploying to the production floor. As noted, the operators are assigned to specific lines and machines on each shift by the PSs. All operators are capable of running any line and machine, and there is no difference in their skills required to run each line and machine. In contrast to the production duties of the PSs, operators primarily spend their time running product on the machines and making sure their assigned machines are running properly, free of any obstruction and debris. When their machine process is complete on the line and the zippers have been made per order, they box the zippers and send the boxed products to the clean room for palletization and final processing in the warehouse. Quality issues discovered by the operators, whether related to machines, equipment, or products, are brought to the attention of the PSs for handling.

The operators are paid an hourly wage rate of \$16.50 to \$17.25 and enjoy the same benefits as the PSs and all facility employees. They are evaluated annually by Production Manager Dergo who consults with the PSs regarding their performance and attendance. As noted, seasoned operators are involved in on-the-job training of new and less experienced operators along with the PSs.

ANALYSIS

A. The Applicable Legal Standard

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Accordingly, under Section 2(11), individuals are deemed to be supervisors if they have authority to engage in any one of the above Section 2(11) indicia; their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and their authority is held in the interest of the employer. See, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712–13 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994)).

Section 2(11)'s definition is read in the disjunctive, and thus, the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and

exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. See, *Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status. See, *Kentucky River*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Since supervisors are excluded from the Act's protection, the Board has been careful to avoid construing the statutory language too broadly. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686). The Board requires supervisory status be established by a preponderance of the evidence. *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Lack of evidence is construed against the party asserting supervisory status. *Id.* at 1048.

To meet this standard, the party bearing the burden must establish that an individual "actually possesses" a supervisory power; mere inferences or conclusory statements of such power are insufficient. See, *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Moreover, where evidence is in conflict or otherwise inconclusive for a particular Section 2(11) indicium, the Board will decline to find supervisory status for that indicium. See, *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Accordingly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

Indicia other than those enumerated in Section 2(11) of the Act are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

B. Application of Legal Standard

There is no claim that any of the PSs possess authority to independently hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, or adjust the grievances of other employees. The record is absent of any evidence that production line employees report directly to the PSs. Rather, the Employer primarily asserts that the PSs are statutory supervisors based on their authority to assign work to and responsibly direct other employees; effectively recommend the hire and discipline of other employees; and other secondary indicia of supervisory status.

1. Assignment of Work

The Board in *Oakwood* defined assigning work as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee."

Oakwood, 348 NLRB at 689. Consistent with *Kentucky River*, the *Oakwood* Board adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” *Id.* at 692. The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Id.* The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Id.* at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, *free of the control of others* and form an opinion or evaluation by discerning and comparing data.” *Id.* at 693. (emphasis added). Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.* at 693

With regard to the element of place, the record evidence establishes that the PSs assign operators to specific lines and machines. Such assignments are based on production needs and goals via the production plan created by the logistics team in coordination with Production Manager Dergo. Notably, all operators are capable of running any line and machine, and there is no difference in the operator skills required to run each line and machine. Thus, such assignment by the PSs with respect to place does not require the PSs to use judgment which involves a degree of discretion that rises above the “routine or clerical” as contemplated in *Oakwood*. *Id.* at 693.

With regard to the element of time, there is no record evidence that the PSs are involved in or have any authority regarding the scheduling of any employees. Additionally, there is no evidence that any of the petitioned-for employees have any authority to approve schedule changes. Although the PSs might be consulted regarding unexpected call-offs of production line employees and potential consequences related to coverage and production issues, the record establishes that all scheduling matters are handled by Production Manager Dergo. To the extent that the PSs are authorized to send production line employees home in emergency situations such as illness, intoxication or exhibiting violent or threatening behavior, this does not establish supervisory authority where there is no evidence that the PSs have any authority to request that off-duty employees come into work for absent employees or that on-duty employees work overtime. The authority to assign overtime or to have off-duty employees come in to work may establish assignment authority within the meaning of Section 2(11), but only if the evidence shows that the putative supervisor can require employees to work overtime or come in when off-duty. *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2156-2157 (2011); *Golden Crest*, 348 NLRB at 729 (2006); *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001). The Employer has not established any exercise of supervisory authority regarding the scheduling of other employees. See, *Golden Crest*, 348 NLRB at 728-730 (2006). Thus, the record does not support that the PSs appoint production line employees to a time as contemplated by *Oakwood*.

With regard to the element of duties, the Employer argues that petitioned-for employees use independent judgment in assigning and directing the duties and tasks of production line employees. As noted, all operators are capable of running any line and machine. There is no

record evidence that the operators possess specific training or skills to operate their machines, or that the PSs perform any detailed analysis of the operators' abilities in relation to production needs and goals. Rather, the operators' overall tasks are largely generated by and defined in the weekly production plan. Additionally, there is no evidence that the PSs make any isolated reassignments concerning the operators.¹¹ The record overall demonstrates that the operators' assignments are routine in nature and based on their title, rather than any particular expertise, and the evidence is insufficient that the direction provided to them by the PSs requires the use of independent judgment or involves a "degree of discretion that rises above routine or clerical." *Oakwood*, 348 NLRB at 693.

2. Responsible Direction

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, *and* that there is a "prospect of adverse consequences" for others' deficiencies. *Community Education Centers, Inc.* 360 NLRB 85-86 (2014); *Oakwood*, 348 NLRB at 691-692, 695.

The Employer has not established that any of the PSs are *accountable* for their actions in directing the production line employees. Although the record evidence establishes that the PSs are largely in charge of day-to-day direction on the production floor, especially during the second and third shifts when no upper management are physically present at the facility, there is no evidence that any PSs have suffered any adverse consequences or received any discipline concerning the deficient performance of any employees. To the contrary, the record demonstrates that Production Manager Dergo prefers to not "lash out" at PSs concerning deficiencies and errors on the production line, but rather handles such matters by engaging in discussion with PSs to work toward a resolution such as providing additional training to production staff or adjustment of machines and equipment. While the Employer argues that the PSs' completion of metrics forms and production checklists in which they critique production line employee performance demonstrates accountability, this is not so where there is no evidence that there is any resulting prospect of adverse consequences for the PSs. The overall record does not demonstrate that the Employer imparted clear and formal notice to any of the PSs that they will be held accountable for the job performance of any employees. See, *Golden Crest*, *supra* at 731. Thus, I find that the Employer has not met its burden to establish that the PSs are responsibly direct production line employees as contemplated by *Oakwood*.

3. Discipline

Regarding the disciplinary authority of the PSs, under Section 2(11) of the Act, individuals are statutory supervisors if they have the authority, in the interest of the employer, to discipline employees or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. *Oakwood*, 348 NLRB at 687. The Employer acknowledges that

¹¹ At any rate, the Board has found that the switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status. *Croft Metals*, 348 NLRB 717, 721 (2006).

none of the PSs possess authority to independently discipline other employees. Rather, the Employer argues that they are involved in the discipline procedure and possess authority and use independent judgment to effectively recommend discipline of production line employees, as evidenced by PS McMillan's involvement in the discipline of an operator.

The record describes that the Employer's intentions in creating the PS position and eliminating the team lead position were, in part, to ascribe additional supervisory authority in the area of production in its efforts to restructure and expand its operations and become more competitive in the plastic zipper market. Along with these efforts came the Employer's specific desire for the PSs to be regularly involved with the Production Manager in disciplinary matters involving production line employees. The Employer exercised its intentions in the first disciplinary matter that came about following the commencement of the PS position. In this example, third shift PS McMillan reported to Production Manager Dergo via email that he witnessed an operator punching a trash bucket and later slamming down the tension arm of a machine some equipment while on the same shift. In this report McMillan referenced previous verbal discussions he had with the same operator about anger issues. It was McMillan that expressed and recommended to Dergo that based on the operator's behavior and previous verbal discussions, formal discipline was warranted. Dergo and McMillan discussed the matter further and jointly determined that a written warning to the operator was warranted and would issue. The write-up issued to the operator, drafted by Dergo, was based solely on McMillan's report. Before the write-up issued, Dergo asked McMillan to review it and make any changes or additions that he thought were necessary. Notably, there is no record evidence that suggests that Dergo conducted any further independent investigation before deciding to impose discipline. Neither the disciplinary write-up nor any other evidence indicates that Dergo did anything more than speak with McMillan before issuing the written warning to the operator. Accordingly, the issued write-up expressly cites only McMillan's investigation. This shows that Dergo relied on McMillan's judgment. Dergo and McMillan met together with the operator to issue the written warning discipline. Although Dergo led the disciplinary meeting, he provided McMillan an opportunity to address the operator. Dergo and PS McMillan both signed the discipline in the "supervisor" area of the write-up.

The disciplinary involvement of the PSs herein is similar to that addressed in *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114 (2007), in which the Board likewise considered a single example of a purported supervisor's exercise of disciplinary authority to determine the disciplinary authority of three purported supervisors, specifically regarding effective recommendation of discipline. The employer therein utilized a "coach-and counsel" approach to respond to employee disciplinary problems. Under that approach, employees were coached and counseled by purported supervisors regarding violations of the employer's policies, procedures, and standards. *Id.* These coach and counseling sessions were very similar to the verbal discussions noted herein between the PSs and production line employees. Notably, in *Starwood*, the purported supervisor in question documented coach-and-counsel sessions through e-mails to upper management and made a recommendation "for more drastic measures" because he believed the circumstances warranted it. *Id.*

Unlike the instant matter, the coach-and-counsel documentation addressed in *Starwood* was placed in the employee personnel files as a record for consideration of future discipline. *Id.* Even though the verbal discussions between PS McMillan and the operator herein were considered by the Employer to be non-disciplinary and were not similarly memorialized in writing or placed in employee personnel files, they nevertheless formed the basis and were relied on for the formal discipline thereafter issued to the operator in question. This is evidenced by the reference to verbal discussions in Production Manager Dergo's April 2020 write-up issued to the operator. Thus, arguably, these verbal discussions initiated by PS McMillan originated the disciplinary process. Notably, in *Starwood*, the disciplined employee was issued a written warning write-up in which "[t]he narrative under 'Reason' was consistent with the information relayed in [the purported supervisor's] coach-and-counsel e-mail..." *Id.* at 1115.

Moreover, when PS McMillan recommended discipline of the operator via his e-mail to Production Manager Dergo, Dergo accordingly disciplined the employee without conducting any further investigation. In *Progressive Transportation Services*, 340 NLRB 1044 (2003), the Board found that a deck lead supervisor possessed authority to effectively recommend discipline under Section 2(11) because she initiated the disciplinary process. The deck lead supervisor brought disciplinary issues to the attention of the director of housekeeping, who decided the level of discipline based on the supervisor's account and advised her about the preparation of the disciplinary notice. *Id.* at 1045-1046. The director typically followed the supervisor's recommendations without an independent investigation. *Id.* Similarly, in *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474-1475 (2004), the Board found that individuals classified as assistant supervisors were supervisors under Section 2(11) because they were authorized to write recommendations for disciplinary action. Although those writeups were reviewed by an upper manager, the manager had a policy of routinely "signing off" on recommendations if they were justifiable, without conducting an independent investigation. *Id.* at 1474. The Board found that if the assistant supervisor brought a disciplinary matter to the attention of management, discipline would ensue, demonstrating that the assistant supervisors' disciplinary recommendations were effective. *Id.* at 1475.

Based on the above, I find that PS McMillan possessed the authority to effectively recommend discipline using independent judgment. McMillan initiated disciplinary action by engaging in non-disciplinary verbal discussions with the offending operator concerning misconduct that the operator subsequently received formal discipline for. McMillan followed up by e-mailing Production Manager Dergo and referencing these prior verbal discussions, and then further discussing the matter and jointly determining with Dergo that the circumstances warranted formal discipline, a written warning, to the employee. Dergo acted in accordance with McMillan's recommendation. Although McMillan did not recommend specific discipline, the record does not show that the Employer maintains any progressive or formal disciplinary policy that McMillan would have been familiar with. Additionally, while there is only one example in the record of a PS actually exercising disciplinary authority, this example demonstrates supervisory authority as explained above and, as noted, the record further establishes that this is the only discipline issued since the conversion of leads to PSs and that the Employer intends for the PSs to be regularly involved in all disciplinary matters involving production line employees going forward.

4. *Hiring*

The Employer does not claim that the PSs possess supervisory authority to independently hire other employees. Rather, the Employer asserts that that they are involved in the hiring procedure and possess authority and use independent judgment to effectively recommend the hire of production line employees, as evidenced by PS Taylor's involvement in the hiring of an operator.

In *J.C. Penney Corp.*, 347 NLRB 127, 129 (2006), the Board explained that:

[T]he power to effectively recommend a hire. . . contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. See, *Bowne of Houston*, 280 NLRB 1222, 1225 (1986) (assistant foreman who interviewed applicants and advised management of the experience of at least one of them did not make hiring decisions or effective recommendations to hire, as management also interviewed all applicants and had final hiring authority); *The Door*, 297 NLRB 601, 601–02 (1990) (finding that an employee lacked authority to effectively recommend hire where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with others, in applicant interviews).

Instead, the Board analyzes supervisory status by determining whether an individual's hiring recommendations are in fact *effective*. Accordingly, the Board examines the amount of weight the employer affords the recommendation. See, *USF Reddaway, Inc.*, 349 NLRB 329, 340 (2007). Specifically, the Board has found recommendations effective when "management is prepared to implement the recommendation without an independent investigation of the relevant circumstances." *Chevron USA*, 309 NLRB 61, 65 (1992). In the absence of such a requirement, an employer's reliance on word-of-mouth referrals could confer supervisory status on the entire staff, since it is not uncommon for employers to expect their more experienced employees to recommend someone for hire. See, *NLRB v. Adco Electric, Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993). The Board has likewise found that "compatibility recommendations" are insufficient to support a finding of effective hiring recommendations under Section 2(11). *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999). An employer need not always follow an individual's hiring recommendations in order for the recommendations to be found effective. *Venture Industries, Inc.*, 327 NLRB 918, 919 (1999). Finally, an individual does not "effectively recommend hiring" unless there was "delegated authority to participate in the hiring process" and not merely an employer's respect for an individual's opinion on an applicant. See, *Plumbers Local 195*, 237 NLRB 1099, 1102 (1978).

Here, Production Manager Dergo testified that he "did not want to push forward with hiring somebody until [Taylor] gave me his agreeance (*sic*) that he wanted to do that or not." Following a comprehensive interview of the prospective operator, Dergo and PS Taylor jointly agreed that the candidate was suitable for hire and an offer of employment was thereafter made. There is no record evidence that Dergo conducted any sort of independent review of the candidate before making a decision on hiring. This supports a finding that Dergo relied on McMillan's judgment and acted in accordance with McMillan's recommendation. The evidence

demonstrates that Taylor was an active and equal participant with Dergo in the hiring process. Taylor was not called in just to evaluate the candidate in discrete areas, such as technical expertise; rather, Taylor participated in the essential portions of the process from interview to hiring decision in an effort to identify the overall best candidate for the job. See, *International Center For Integrative Studies/The Door*, 297 NLRB 601, 601-602 (1990) (an assessment of a candidate's technical ability to perform the job does not constitute an effective hiring recommendation). The presence of Dergo during the candidate's comprehensive interview does not detract from a PS's authority to effectively recommend hiring. See, *Detroit College of Business*, 296 NLRB 318 (1989) (finding department coordinators effectively recommended hiring where they participated in joint interviews with higher-level officials, hiring decisions were made jointly, no instructor had ever been hired without the consent of a coordinator and the coordinators' recommendations were followed in all but two of twelve hires). Although the record does not address what Dergo would have done had McMillan provided a negative hiring recommendation, Plant Manager Burton's testimony that the Employer requires PSs to "buy off on" all new hire operator applicants indicates that a recommendation from McMillan not to hire the applicant would have been fatal. I note that Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise. See, *Starwood*, 350 NLRB at 1118 (other citations omitted).

Based on the above, I find that PS Taylor possesses the authority to effectively recommend discipline using independent judgment. Although there is only one example in the record of a PS actually exercising hiring authority, this example demonstrates supervisory authority as explained above and, as noted, the record further establishes that this is the only hiring that has occurred since the lead position was converted the PS position and that the Employer intends for the PSs to be regularly involved in all hiring matters involving production line employees going forward.

5. Other Secondary Indicia

While the Board has held that secondary indicia can be a factor in establishing supervisory status, it is well established that where putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest*, 348 NLRB at 730, fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

The Employer submitted into evidence the PSs' job description which purports to designate them as supervisors. The Board has held that job descriptions, without more, do not establish actual supervisory authority. *Training School at Vineland*, 332 NLRB at 1416 ("Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority."). It is well settled that job descriptions without more are not controlling to establish supervisory status. *K.G. Knitting Mills*, 320 NLRB 374 (1995). I acknowledge that the PS job description has not been disseminated to any of the current PSs and does not contain any reference to authority regarding hiring. However, it does support my finding with regard to discipline in that it provides that PSs are responsible for "regularly [acknowledging] and administering disciplinary practices as needed." I also note that the PSs are the highest-ranking

officials on premises during off-hours and earn significantly higher wages compared to the other petitioned-for employees which I consider to be compelling secondary indicia further supporting their supervisory status.

Other secondary indicia advanced by the Employer is not similarly compelling. The PSs involvement in on-the-job training of new and less experienced operators does not support supervisory authority where the record demonstrates that seasoned operators similarly conduct the same training. At any rate, the Board has frequently found that employees with training or instructional duties are not supervisors within the meaning of the Act. See, *The Washington Post Co.*, 242 NLRB 1079, 1083 fn. 15 (1979) (citing *House of Mosaics*, 215 NLRB 704, 712 (1974) (“having the responsibility of training new employees does not invest employees with supervisory authority within the meaning of the Act.”). The third shift PS’s involvement in holding weekly production meetings with production line employees is also not supportive of supervisory status where the record establishes that Production Manager Dergo routinely prepares a detailed bullet-point agenda for each weekly meeting from a computer template for the third shift PS. Finally, none of the PSs attend any management meetings.

CONCLUSION

In reaching my conclusion that the PSs are statutory supervisors, I have carefully weighed the indicia of supervisory authority set forth in Section 2(11) of the Act. I conclude that the PSs possess authority to effectively recommend hiring and discipline.

Based on the foregoing, I conclude that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees including quality control employees, warehouse employees, operators, clean room operators, and maintenance employees; excluding office clericals, professional employees, managers, guards and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by DISTRICT LODGE 6, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO.

A. Election Details

I direct that the election be conducted by mail ballot.¹²

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Region 18, on June 22, 2020 at 4:30 p.m. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 18 office by 4:30 p.m. on June 29, 2020 in order to arrange for another mail ballot kit to be sent to that employee.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 18 office, by close of business, 4:30 p.m., on July 8, 2020. The mail ballots will be commingled and counted at the Region 18 office located at Federal Office Building, 212 Third Avenue South, Suite 200, Minneapolis, MN 55401-2657 at 3:00 p.m. on July 15, 2020. The method for the count may require virtual participation and will be determined by the Regional Director prior to the count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **June 10, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

¹² While the parties are in agreement that a manual election is appropriate in this matter, I disagree. In this regard, I note that the parties did not propose any safeguards or safety precautions which would be necessary at a manual election in light of the current and ongoing COVID-19 pandemic (e.g. social distancing measures, provision of face masks and other personal protective equipment (PPE), etc.). I find that a mail ballot election would meet the current COVID-19 guidance provided by the Centers for Disease Control (CDC) as well as the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. At this time, a mail ballot election is the appropriate course of action in this matter under the extraordinary circumstances presented by COVID-19. See, *San Diego Electric*, 325 NLRB 1143 (1998).

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Tuesday, June 16, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to

12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.¹³ A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: June 12, 2020

/s/ Jennifer A. Hadsall

JENNIFER A. HADSALL, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 18 - Federal Office Building
212 Third Avenue South, Suite 200
Minneapolis, MN 55401-2657

¹³ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. Parties who do not have necessary access to the Agency's E-Filing system may provide a statement explaining the circumstances, or why requiring them to E-File would impose an undue burden.